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Supreme Court of the United States

OCTOBER TERM, 1961

No. [redacted] 75

MADELINE C. SCHROEDER,

Appellant,

against

THE CITY OF NEW YORK,

Appellee.

MOTION TO DISMISS

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MOTION TO DISMISS

The City of New York, pursuant to Rule 16 of the Revised Rules of this Court, moves to dismiss this appeal from the final order and judgment of the New York Court of Appeals affirming the dismissal of the complaint, on the ground that it does not present a substantial federal question.

Reported below: 14 A D 2d 183, 217 N. Y. S. 2d 975; 10 N. Y. 2d 522; — N. E. 2d —.

The Statute Involved

Section K41-8.0 of the Administrative Code of the City of New York is printed at pages 24-25 of the appellant's jurisdictional statement. It provides that notice of the application for the appointment of Commissioners of Appraisal in New York City water supply proceedings shall be published in the City Record, and in two public newspapers published in the City of New York and in two public newspapers published in each county in which the real estate affected may be located. Such notices must be

published in each county in which the real estate affected may be located. Such notice must be published once in each week for six weeks immediately previous to the presentation of the petition. And in addition the Corporation Counsel must cause copies thereof to be posted for the same period of time in at least 20 conspicuous places in the vicinity of the real estate to be taken or affected.

This section was derived from L. 1905, ch. 724, § 8 which in turn was derived from L. 1883, ch. 490, § 7. Notice by publication and posting has been the prescribed form of notice in New York City water supply proceedings since 1883.

Counter-Statement of Question Presented

Does notice by publication and posting for six weeks, pursuant to Section K41-8.0 of the Administrative Code of the City of New York of an application for the right to divert water from riparian property of a non-resident owner, whose address was not known to the City, constitute sufficient notice under the Due Process Clause of the Federal Constitution?

Statement of the Case

The appellant, a resident of New Jersey (R. 12), is the owner of certain real estate in New York which is riparian to the Neversink River (R. 11).

The City of New York, as part of its famed Delaware project (R. 20-21), constructed the Neversink Dam and Reservoir on the Neversink River, upstream from the appellant's property (R. 12, 14).

During the construction of the dam and reservoir, early in 1952, the City instituted a proceeding, pursuant to Title K of Chapter 41 of the Administrative Code of the City of New York (hereinafter referred to as the Water Supply Act), to acquire the right, as against owners of properties located below the dam, to divert a portion of the waters

of the Neversink River (R. 12). The City acquired the right to divert on June 9, 1952 (R. 12, 25-26) and actual diversion commenced on June 1, 1953 upon completion of the dam (R. 14, 26).

The appellant did not file a claim for damages in the riparian proceeding (R. 27-28), but in January 1960 (R. 17), six and one-half years after the diversion and seven and one-half years after the acquisition of the right to divert, she commenced the present suit for an injunction restraining the City from diverting water from the Neversink River. The appellant alleged in her complaint that she did not customarily purchase New York newspapers; that she did not see any of the published notices; that she did not observe any of the posters; and that she did not learn that the City had "acquired any portion of her property" or that she "had a right to a claim" until September, 1959 (R. 13-14). Significantly, however, the appellant did not allege that she was unaware of the diversion.

The appellee by its answer interposed the defense of the three year statute of limitations contained in Section K41-18.0 of the Water Supply Act. After the appellant served a reply, in which she admitted compliance by the City with the various steps prescribed by the Water Supply Act but denied that the City had acquired the right to divert water from the river and that her action was barred, the City moved for judgment on the pleadings which motion was granted and the complaint was dismissed. This action of the lower court was sustained on appeal to the Appellate Division and to the New York Court of Appeals.

ARGUMENT

Where, as here, the right acquired was one to divert water flowing past the property of a non-resident owner whose address was not known and the effect of the diversion was visible, notice by publication and posting for six weeks was sufficient under the Due Process Clause of the Federal Constitution.

Due process does not require personal service in every type of proceeding, especially in the case of non-residents. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U. S. 306, 314 (1950).

In *Huling v. Kaw Valley Railway and Improvement Co.*, 130 U. S. 559 (1889), this Court held that as against a non-resident owner notice of the condemnation proceedings by thirty days publication did not violate due process even though the owner had no actual notice.

Even when a resident is involved personal service is not always required. An *in rem* foreclosure of property for arrears of water charges was upheld in *Nelson v. City of New York*, 352 U. S. 103 (1956), where notice was published, posted and mailed to the owner in accordance with the provision of the statute, even though the owner never received the mailed notice which was concealed by his bookkeeper. This Court recognized that publication, where reinforced by other acts such as service by posting and mailing, was sufficient and that personal notice was not indispensable to due process.

The test of the constitutionality of a notice is whether it is reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of the proceeding. *Mullane v. Central Hanover Bank and Trust Company*, 339 U. S. 306, 314 (1950), cited in appellant's jurisdictional statement (pp. 2, 7). *Walker v. Hutchinson*, 352 U. S. 112, 115 (1956) (Jurisdictional Statement, pp. 2, 7)

The *Mullane* case, *supra*, held that notice by publication alone for the settlement of an account in a common trust fund pursuant to the New York Banking Law, was inadequate as to beneficiaries whose names and addresses were *known* to the trustee. Such notice was held to be adequate as to beneficiaries whose addresses were *unknown* and did not come to the attention of the trustee in due course of business, and the objections to such notice on behalf of the latter beneficiaries, as well as those whose interests were future or conjectural, were expressly overruled even though the interests or addresses could have been discovered upon investigation (339 U. S. 317 318).

Although the complaint in the present case does not allege that the appellee knew the appellant's address, the appellant intimates that the appellee knew the appellant's address (Jurisdictional Statement, p. 7). The fact is that although the appellee, of course, knew the location of the subject property it did not know the appellant's address. Furthermore, the appellee was under no obligation to attempt to ascertain the address of the appellant, because the statute did not require either personal service or service by mail.

This Court in the *Mullane* case recognized that notice by publication would be sufficient if reinforced by other acts when it said (p. 316):

> "It is true that publication traditionally has been acceptable as notification supplemental to other action which in itself may reasonably be expected to convey a warning. The ways of an owner with tangible property are such that he usually arranges means to learn of any direct attack upon his possessory or proprietary rights. Hence, libel of a ship, attachment of a chattel or entry upon real estate in the name of law may reasonably be expected to come promptly to the owner's attention. When the state within which the owner has located such property seizes it for some reason, publication or posting affords an additional measure of notification."

In the present case the notice was posted as well as published and the diversion of water from the river constituted an entry upon the plaintiff's real estates. Therefore, the notice given in the present case complied with the rule set forth in the *Mullane* case.

New York v. New York, N. H. & H. R. Co., 344 U. S. 293 (1953) (Jurisdictional Statement, pp. 2, 7), involved a railroad reorganization proceeding where the City had a lien for taxes upon specific parcels of land owned by the railroad. The Bankruptcy Act provided that the judge should require "reasonable notice" of the period in which claims should be filed "by publication or otherwise" and should require proper persons to file a list of all known creditors, the amount and character of their claims and their last known post office addresses. The District Court issued an order directing creditors to file their claims by a prescribed date, after which unfiled claims would be barred. The railroad was required to mail copies of the order to the mortgagees and to all creditors who had already appeared in the proceeding. The notice given to other creditors, including the City, consisted of two once-a-week publications of the order in five daily newspapers, only one of which, the Wall Street Journal, was published in New York. The City did not receive a copy of the bar order and did not file its lien claim within the period designated in the order. Although the railroad and the bankruptcy trustees knew of the City's lien the City was not listed as a creditor and although notice was mailed to the railroad's mortgagees, whose lien was subordinate to that of the City, notice was not mailed to the City. If the City had been listed as a creditor in accordance with the statute, notice probably would have been mailed to the City too. It appeared that the City knew that reorganization proceedings were pending in court. However, the time limitation for filing claims was not prescribed by the statute, as it is in the present case, but by the bar order. Under these circumstances, this Court held that such pub-

lication was ineffective to bar the City's claim and that the City had a right to assume that the statutory "reasonable notice" of the bar order, which prescribed the date by which claims had to be filed, would be given. This Court recognized, however, (p. 296) that notice by publication may be justified when the names, interests and addresses of persons are unknown. As previously indicated, the address of the appellant in the present case was not known to the City.

Walker v. *Hutchinson*, 352 U. S. 112 (1956), involved the constitutionality of a Kansas condemnation statute which required a city to give landowners ten days notice of the time and place of the proceeding and further provided that such notice could be given either "in writing . . . or by one publication in the official city paper . . . ." The petitioner's name was not only known to the city but was on the official records. Nevertheless, he was not notified of the proceeding, the condemning authority relying entirely upon a single publication in a newspaper. This Court held that, under the circumstances of that case, the notice by publication fell short of the requirements of due process. The opinion (p. 116) cited the *Huling* case, *supra*, and referred to the fact that the plaintiff in that case (like the appellant here) was a non-resident as a ground for distinguishing the *Huling* case from the *Walker* case where the plaintiff was a resident. In *Walker* there was nothing to reinforce the single publication.

In the instant case the notice was published in the City Record, and in two public newspapers published in the City of New York and in two public newspapers published in each county in which the real estate affected was located. It was published once in each week for seven weeks immediately previous to the presentation of the petition. And in addition the copies thereof were posted for the same period of time in 22 conspicuous places in the vicinity of the real estate taken or affected.

The notices which were posted in the riparian proceeding here were printed with permanent ink on canvas approximately 24¼ inches long and 18 inches wide and firmly affixed to the places to which they were attached. One of the notices was posted on a pole on the westerly side of the Neversink River at the corner of Route 209 and the road to a railroad station (Def. Ex. C; R. 24, 34). As appears from sheet No. 10 of the condemnation map (Def. Ex. A; R. 23, 60) the road to the railroad station from Route 209 was a short dead-end road, over approximately 1200 feet of which it was necessary for the appellant to pass in order to reach her property (Parcel 424). It was therefore almost as though the notice was posted on the appellant's own driveway.

Contrary to the appellant's contention the appellee was very conscientious about the publication and posting of the notices. The notices were published seven times instead of the six times prescribed by statute and twenty-two handbills were posted instead of the twenty prescribed by statute (Def. Ex. C; R. 24, 33). These handbills were posted in the most conspicuous places near the river (Def. Ex. C; R. 24, 33-37). Thus the posting was of such a character as to be reasonably calculated to give these claimants notice.

The *Walker* opinion stated, at p. 115, that "notice required will vary with circumstances and conditions."

A circumstance bearing on the reasonableness of the notice given here was the size and character of the project. The Neversink Dam is approximately 2800 feet in length (Def. Ex. D; R. 25, 42). The reservoir is approximately 5 miles in length with a maximum width of about 1.5 miles and an average width of about one-half mile and a shore line of approximately 18 miles (Def. Ex. D; R. 25, 43). The construction of such a reservoir involves the removal of hundreds of people from the reservoir area, the relocation of highways and utilities and the employment of hundreds

of men, including many local men. The land is cleared of all building and improvements as well as trees and shrubs. Even the remains of the dead are moved from cemeteries in the area to be flooded for reinterment elsewhere. Such proceedings are of great local interest so they are accompanied by a great deal of publicity. Of necessity such proceedings come to the attention of everyone for miles around and particularly to the attention of the owners of properties which are likely to be affected.

The construction of the reservoir and the patently visible diversion of water from the river are circumstances and conditions which, under the doctrine of the *Mullane* and *Walker* cases, may properly be taken into consideration in determining that notice given here was reasonably calculated to apprise interested parties of the proceeding and afford them an opportunity to present their claims.

We submit that under the circumstances the notice required by the Water Supply Act falls well within the constitutional standards referred to in the cases cited and that, accordingly, any attack on the constitutionality of the notice provision of the Water Supply Act must fail. See *Annotation in 1 L. Ed. 2d 1635 et seq.* on "Due process requirements as to notice in condemnation proceedings—Supreme Court cases." Accordingly, under the facts and circumstances surrounding the present case the defense of the Statute of Limitations was properly sustained.

As to the alleged failure of a number of owners to file claims, in a proceeding to acquire riparian rights, as distinguished from one to acquire properties in fee, it may be expected that some owners may not file claims, not because they are unaware of the diversion but because they may feel that their properties are not sufficiently affected to justify the filing of claims. As the index sheet of the taking map (Def. Ex. A; R. 23, 60) indicates, fourteen of the parcels in Neversink Riparian Section No. 4, where the appellant's property is located, are mapped to

"Unknown" owners. In view of the fact that title to the bed of a stream is frequently in doubt and that a riparian owner who can prove title only to the bank of the stream usually proves the same elements of damages as could be proved if title to the river-bed parcels could be established, it is not surprising that claims may not have been filed covering a number of such parcels. Other parcels, mapped to known owners, were unimproved and some of the properties were occupied in such manner as to obtain little, if any, benefit from the river. In any event the failure of owners of other parcels to file claims for damages to their properties does not excuse the appellant for her failure to file a claim within the statutory period.

Wuchter v. *Pizzutti*, 276 U. S. 13 (1928), cited in appellant's jurisdictional statement (pp. 2, 8-9), held that actual notice by service of proposed execution in Pennsylvania did not validate a judgment rendered in accordance with a non-resident motorist statute of New Jersey which provided for service on the Secretary of State but did not require the Secretary of State to mail the notice to the defendant. That case, which was decided in 1928 and in which Justices BRANDEIS, HOLMES and STONE dissented, is apparently inconsistent with the later holding of this Court in the *Mullane* case, *supra*. There notice by publication was held to be sufficient as to beneficiaries whose addresses were not known or whose interests were conjectural or future although it did not appear that they had actual notice and this Court indicated (339 U. S. at p. 318), that notice to the known beneficiaries would have been sufficient if the notice had been served personally or by ordinary mail. After citing the *Wuchter* case, the *Mullane* opinion stated (p. 319):

> "Of course personal service even without the jurisdiction of the issuing authority serves the end of actual and personal notice, whatever power of compulsion it might lack. However, no such service is required under the circumstances."

Also in the *Walker* case, *supra*, this Court said (352 U. S. at p. 116) that even a letter would have apprised the owner that his property was about to be taken and that he would have to appear if he wanted to be heard as to its value. Thus this Court implied that if the owner in that case had had actual notice, or even if a letter had been mailed to him the decision would have been different. The *Wuchter* case, unlike the present case, was not concerned with the tangible and visible.

In view of the fact that the notice given in the present case clearly complies with the test previously laid down by this Court for the sufficiency of notice in cases of this kind no question remains sufficiently substantial to require review by this Court. See *Zucht* v. *King*, 260 U. S. 174, 176 (1922) where this Court refused jurisdiction of a constitutional question on the ground that the question had ceased to be substantial because of prior decisions.

CONCLUSION

Appellant has presented no substantial question for resolution by this Court. The appeal should be dismissed.

March 19, 1962.

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